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IN THE

Supreme Court of the United States

RICHARD L. MATHIAS, *et al.*,

Petitioners,

v.

WORLDCOM TECHNOLOGIES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

JAMES E. RYAN
Attorney General of Illinois

JOEL D. BERTOCCHI
Solicitor General
Counsel of Record

A. BENJAMIN GOLDGAR
MICHAEL P. DOYLE
RICHARD S. HUSZAGH
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3698

MYRA L. KAREGIANES
General Counsel

JOHN P. KELLIHER
THOMAS R. STANTON
Special Assistant
Attorneys General
Illinois Commerce Commission
160 North LaSalle Street
Chicago, Illinois 60601
(312) 793-2877

Counsel for Petitioners

Wright Appellate Services
(215) 733-9870 • (800) 507-9020 • Fax (215) 733-9872

1102

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. RESPONDENTS' READING OF §252 IS INCONSISTENT WITH ITS PLAIN LANGUAGE AND WITH THE COMPETITIVE OBJECTIVES OF THE 1996 ACT. 1

II. ILLINOIS WAS NOT "INVITED" TO PARTICIPATE IN LOCAL TELEPHONE REGULATION AND DID NOT "OPT" TO WAIVE ITS ELEVENTH AMENDMENT IMMUNITY KNOWINGLY OR VOLUNTARILY 9

III. THE ELEVENTH AMENDMENT AND THE 1996 ACT ITSELF BAR A SUIT UNDER *EX PARTE YOUNG* BASED ON AN ALLEGATION THAT OFFICIALS MISAPPLIED FEDERAL LAW WHEN THOSE OFFICIALS ARE PART OF A REGULATORY APPARATUS DESIGNED TO CORRECT SUCH ERRORS. 16

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Alabama Pub. Serv. Comm'n v. Southern Ry. Co., 341 U.S. 341 (1951) 17, 18

Anderson v. Yungkau, 329 U.S. 482 (1947) 12

Ardestani v. INS, 502 U.S. 129 (1991) 2, 3, 4

Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985). 10

AT&T v. Iowa Util. Bd., 525 U.S. 366 (1999) 14, 15

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 7

Colfax Envelope Corp. v. Local No. 458-3M, Chicago Graphic Communications Intern. Union, AFL-CIO, 20 F.3d 750 (7th Cir. 1994) 6

College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) 11, 12, 13, 14

Conboy v. AT&T Corp., 241 F.3d 242 (2nd Cir. 2001) 20

Dellmuth v. Muth, 491 U.S. 223 (1989) 10

Ex parte Young, 209 U.S. 123 (1908) 17, 18, 19

FEC v. NRA Political Victory Fund, 513 U.S. 88 (1994) ... 8

Fuller v. CBT Corp., 905 F.2d 1055 (7th Cir. 1990) 4

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 17

Iowa Util. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), *rev'd on other grounds, AT&T v. Iowa Util. Bd.*, 525 U.S. 366 (1999) 5, 6

Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, 457 U.S. 15 (1982) 8

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) 16, 17

Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998) 12

Lopez v. Davis, 531 U.S. 230 (2001) 12

Lopez-Elias v. Reno, 209 F.3d 788 (5th Cir. 2000), *cert. denied*, 121 S.Ct. 757 (2001) 8

Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986) 8

Minnesota v. Hitchcock, 185 U.S. 373 (1902) 16, 17

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 9

Murphy Exploration and Production Co. v. Dep't of the Interior, 252 F.3d 473 (D.C. Cir. 2001) 8

Parden v. Terminal Ry., 377 U.S. 184 (1964) 15

Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) 16, 17

Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959) 13, 14

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 18, 19

South Dakota v. Dole, 483 U.S. 203 (1987) 13, 14

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998)..... 14

Constitutional Provisions and Statutes

U.S. Const., art. 1, § 10 (The Compact Clause)..... 13

U.S. Const., art. VI, cl. 2. (The Supremacy Clause)..... 17

U.S. Const., amend XI..... *passim*

5 U.S.C. § 554..... 3

9 U.S.C. § 1 *et seq.*..... 9

28 U.S.C. § 2342..... 18

47 U.S.C. § 152(b)..... 14

47 U.S.C. § 153(41)..... 19, 20

47 U.S.C. § 251..... 2, 5, 19

47 U.S.C. § 251(c)..... 2

47 U.S.C. § 252..... *passim*

47 U.S.C. § 252(a)..... 2

47 U.S.C. § 252(a)(1)..... 2

47 U.S.C. § 252(b)(4)(B)..... 12

47 U.S.C. § 252(e)..... 15

47 U.S.C. §252(e)(5)..... 7, 11, 12

47 U.S.C. § 252(e)(6)..... *passim*

47 U.S.C. § 252(g)..... 12

47 U.S.C. § 252(h)..... 12

47 U.S.C. § 401(a)..... 20

220 ILCS 5/2-101..... 20

220 ILCS 5/10-108..... 11

220 ILCS 5/10-109..... 11

220 ILCS 5/10-110..... 11

220 ILCS 5/10-201..... 17

220 ILCS 5/10-202..... 17

Other Authorities

Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 Colum. L. Rev. 1323 (1998)..... 6, 7

Starpower Communications, 15 FCC Rcd. 11,277 (2000)..7

INTRODUCTION

Respondents barely acknowledge the text of the relevant statutes before hurrying to argue that federal suits to review interpretations of interconnection agreements are essential under the Telecommunications Act of 1996 ("the 1996 Act" or "the Act"). Respondents' claims run afoul of various requirements that the plain language of statutes be honored when those statutes grant federal jurisdiction or are relied on to breach Eleventh Amendment immunity. And although Respondents acknowledge that the 1996 Act changed the regulation of local telecommunications profoundly, they do not appreciate the nature of the change. Rather than recognize that the Act represents a new regulatory model that promotes competition by treating telecommunications providers more like traditional business competitors, Respondents, both as the regulator (the United States) and the regulated (Ameritech, AT&T and WorldCom), seek to stave off the Act's consequences in favor of the familiar comfort of universally-applicable rules. Their effort is built on a series of untenable propositions, among them that a contract is not really a contract, that interpreting the language of a contract is really modifying or re-forming it, that only federal courts can assure consistency with federal law, that "shall" means "may," and that "fails to carry out its responsibility" means "freely declines." Bereft of these propositions, Respondents' positions cannot stand.

I. RESPONDENTS' READING OF §252 IS INCONSISTENT WITH ITS PLAIN LANGUAGE AND WITH THE COMPETITIVE OBJECTIVES OF THE 1996 ACT.

In arguing that state commissions make interpretation and enforcement decisions "under [§252]," Respondents make no

serious effort to address the language of that section.[1] Instead, they offer textually-unsupported claims regarding, for example, what Congress "necessarily" intended, Brief of the United States ("US Br.") at 12, or "could not have intended," *id.* at 18. Respondents rely on words or phrases in § 252(e)(6) such as "any case," "determination" or "action," but do not recognize that *each* of those words or phrases is qualified by the phrase "under this section." Whatever action a state commission may take, it must be done "under" § 252 to be reviewed in federal court under § 252(e)(6).

Ameritech argues that § 252(a)(1) refers to interconnection agreements as "binding" and then leaps to the claim that the duty to adhere to these agreements is thereby imposed "under" § 252. Brief of Ameritech ("Ameritech Br.") at 15-16. The word "binding" in § 252(a), however, is only a descriptive reference to § 251(c), which imposes the legal obligation on incumbent carriers to enter into these agreements. Ameritech cannot use this word to bootstrap obligations imposed by § 251 into § 252. As § 252's title suggests, its scope is limited to "[p]rocedures for negotiation, arbitration and approval of agreements." The body of § 252 likewise deals only with such procedures; it is silent regarding anything that occurs after the approval process ends.

In addressing what Congress must have meant, rather than what it said, Respondents make two errors. First, they run afoul of the analysis prescribed in *Ardestani v. INS*, 502 U.S. 129 (1991), for construing statutory language that limits an exercise of authority to situations occurring "under" a specified statute. Respondents' attempts to distinguish *Ardestani* are unpersuasive. In *Ardestani* the Court considered the availability of an award of attorney's fees restricted by stat-

[1] All statutory references in this brief will be to sections of Title 47, United States Code, unless specifically cited otherwise.

ute to a party who prevailed in an administrative proceeding conducted "under" 5 U.S.C. § 554. That section, like 47 U.S.C. § 252, set forth certain procedures and specified the kinds of cases to which they applied. 502 U.S. at 132-33. Observing that the deportation proceeding at issue was not subject to the Administrative Procedure Act ("APA") (including 5 U.S.C. § 554) because immigration proceedings had been exempted from the APA by another statute, the Court concluded that the proceeding at issue was not one conducted "under" 5 U.S.C. § 554. 502 U.S. at 134.

Ardestani rejects just the sort of policy arguments that Respondents offer here. The Court held that, in the absence of a "conclusive statement" of legislative history indicating that the "unqualified reference to a specific statutory provision mandating specific procedural protections" should not limit the applicability of the fee provision, that limitation was exclusively expressive of congressional intent. *Id.* at 136. The Court disapproved essentially the same argument Respondents advance here, namely "that a functional interpretation of [the statute] is necessary in order to further the legislative goals underlying the statute." *Id.* at 137-38. The Court agreed that the statute's "broad purposes" would be served by applying it outside its textual limits, but held that the text governed, adding that a narrow reading was particularly appropriate where a waiver of sovereign immunity, *i.e.*, the authorization of an award of attorney's fees against the United States, underlay the application of the statute. *Id.* at 137, 139. Similar immunity waiver concerns in this case also support a narrow reading of §252(e)(6).

Respondents follow the path rejected in *Ardestani*. They point to no legislative history to support their claim that § 252 should be applied to proceedings in which anything other than negotiation, arbitration or approval occurs. Instead, Respondents proffer "functional" reasons to read the statute more broadly, *e.g.*, that it would lead to results con-

sistent with their view of sensible regulatory policy. This approach contravenes settled rules of construction that, contrary to the claim of Respondent WorldCom Technologies, *et al.*, ("WorldCom Br.") at 27, Petitioners (in their initial Brief at 17-18) have supplied: "strict fidelity to [the] terms" of federal judicial review provisions in light of the limited jurisdiction of federal courts and rejection of "functional" interpretations unsupported by statutory language or "conclusive" legislative history. The question is not, as posed by the United States (US Br. at 25), whether Congress meant to preclude federal court review of interpretation rulings; it is instead whether § 252 granted such jurisdiction. Respondents' arguments are no more than pleas for the kind of interpretation rejected in *Ardestani*.

Respondents' second error is that they have misconceived the intent behind Congress' passage of the 1996 Act. Although the Act substantially changed the regulation of local telecommunications, Respondents do not recognize the nature of that change. They argue that the Act elevates uniformity in the terms under which they deal with one another as competitors above all else, including competition itself, and claim that federal court review is necessary to assure that all local service providers -- whether incumbents or those seeking network access -- deal with one another on such identical terms. Perhaps conceding that § 252(e)(6) is indeed limited to the process of forming and approving agreements, Respondents first claim that interpreting contracts after they have gone into effect is really modifying and thus reforming them, something that would come as a surprise to any first-year law student. *See, e.g., Fuller v. CBT Corp.*, 905 F.2d 1055, 1058 (7th Cir. 1990).[2] Indeed, in light of the

[2] There is even less basis, in experience or in the record of this case, for the suggestion of Respondents AT&T, *et al.* that parties intentionally "defer" issues until the interpretation process. AT&T Br. at 21.

widely-recognized distinction between the formation and interpretation of a contract, every circuit to address the issue has held, as WorldCom notes (WorldCom Br. at 29), that the interpretation of an interconnection agreement involves issues of state, and not federal, law. Ultimately, Respondents' true contention is that what Congress calls "agreements" in §§ 251 and 252 are not really agreements at all, but are more like tariffs specifying universally available terms.

That disputes over the language in interconnection agreements can have substantial consequences for the parties is not surprising and does not differentiate these agreements from contracts generally. When problems arise in contract negotiations they are settled (or not) by the parties, but when they arise after a contract is in force, they are resolved either between the parties or in state courts. Thus the fact that the timing of a dispute may affect the forum in which it is resolved is an unremarkable notion. That notion does not justify the conclusion that, despite the obvious distinction between formation and interpretation, Congress necessarily intended to treat them the same. And even if there are instances in which adjudicators genuinely modify agreements, this case, in which the Illinois Commerce Commission ("ICC") considered claims of breach of contract and based its ruling on the language of the agreements (which it then found to be in harmony with federal law, Jt. App. 112a-118a), is not one of those cases.[3] The real danger of "ma-

[3] Respondents' repeated reliance on the ICC's reference to § 252 in its order as an admission of federal jurisdiction is misplaced. The ICC cited § 252, as well as Illinois law, only in observing that its jurisdiction to interpret the agreements was "not disputed." The ICC also cited *Iowa Util. Bd. v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997), *rev'd on other grounds*, *AT&T v. Iowa Util. Bd.*, 525 U.S. 366 (1999). Jt. App. 112a. In that case, which concerned a challenge to FCC rules, the Eighth Circuit observed that state commissions "retain the primary authority" to interpret

nipulation" in these cases is not that timing may dictate the forum for review of state commission determinations, but that parties to an agreement will try to create a basis for federal jurisdiction by recasting a dispute over interpretation as a "reformation." *See, e.g., Colfax Envelope Corp. v. Local No. 458-3M, Chicago Graphic Communications Intern. Union, AFL-CIO*, 20 F.3d 750, 755 (7th Cir. 1994) (Cudahy, J., concurring) ("By framing this question as one of a 'meeting of the minds,' Colfax tries to turn an ordinary question of interpretation into one of formation, and thereby get out from under the arbitration clause.").

Although it could have done so, Congress did not impose or authorize universal terms of access in § 251. Instead, it chose the contract, the embodiment of the individual business relationship, as its vehicle to introduce competition into local telecommunications. This choice demonstrates that the 1996 Act represents a turn away from older regulatory models, which operate on universal terms (such as tariffs), toward a "new paradigm [that] seeks to subject to ordinary contractual relations all common carrier and public utility services that can be provided by multiple competing providers." Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 Colum. L. Rev. 1323, 1363 (1998). This "new paradigm" is "manifested most clearly in" the 1996 Act. *Id.* at 1323. Moreover, these changes in regulatory policy are not confined to altering the relationships between providers and end-users. Un-

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and enforce interconnection agreements and added in dicta that federal district courts could review those determinations, 120 F.3d at 804 and n. 24. The ICC's citation clearly referred to the statement regarding "retain[ing]" jurisdiction, as the later reference to the case (Jt. App. 121a) made clear. Because jurisdiction was undisputed, the ICC had no occasion to consider whether it was conferred by, or simply left undisturbed by, § 252.

der schemes like the Act, regulation of the relationships among competing providers focuses on the general terms under which the parties will conduct their relationships, leaving later disputes to be worked out in ways more customarily associated with traditional businesses. *See id.* at 1361 ("where [regulatory] intervention occurs, the role of the regulator is more likely to consist of setting the background rules that help define the industry's structure than superintending the competitive behavior of rival providers or the details of transactions within that industry.").

A proper assessment of congressional intent contradicts Respondents' assertions that federal court review is as necessary after a contract is approved as it is during the approval process. The most natural conclusion from the absence of any provision in § 252(e)(6) for review of decisions made after approval is that the need for such review vanishes once access to networks, the Act's principal means to introduce competition in this area, is accomplished by the implementation and approval of an agreement. The fact that approval does not represent the "endpoint" of all possible disputes (Ameritech Br. at 24) misses the point; under the Act, approval of an agreement marks the end of the process of defining the relationship among the parties in a contract (the "background rules") and of the need for federal court supervision of the parties' relationship.

Several other points made by Respondents can be addressed briefly. The Court owes no deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the decision of the Federal Communications Commission ("FCC") in *Starpower Communications*, 15 FCC Rcd. 11,277 (2000), that *it* had jurisdiction to interpret agreements under §252(e)(5) after Virginia's state utilities commission declined to do so. The FCC relied solely on appellate court opinions regarding courts' jurisdiction -- that is, on the same arguments under review in this

case. The Court owes no administrative agency, even one with a regulatory role in the area, deference regarding a question of federal court jurisdiction. *Murphy Exploration and Production Co. v. Dep't of the Interior*, 252 F.3d 473, 478-80 (D.C. Cir. 2001); *Lopez-Elias v. Reno*, 209 F.3d 788, 791 (5th Cir. 2000), *cert. denied*, 121 S.Ct. 757 (2001); *cf. FEC v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1994) (statutes authorizing agencies to litigate in federal courts are not "the sort of provisions that can be said to be within the province of the agency to interpret.").

Ameritech is also wrong in claiming that the incorporation of the 1996 Act's definitions of reciprocal compensation into the agreements at issue justifies federal court review (Ameritech Br. at 28). Parties to a contract cannot create federal jurisdiction. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 814 (1986); *Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 29 (1982). The ICC and Illinois' reviewing courts are obliged to follow federal law in interpreting agreements and to assure that nothing the ICC decides is inconsistent with the aims of the 1996 Act, but that duty is not imposed by the contents of the agreements, nor do they confer unnecessary jurisdiction on the federal courts to enforce it. Indeed, the ICC adhered to these principles in this case, initially considering the language of the contracts in reaching its decision (Jt. App. 112a-114a) and then reviewing that determination for consistency with the Act and FCC pronouncements (Jt. App. 114a-117a). Illinois courts are both able and required to do the same, assuring that rulings interpreting interconnection agreements will not frustrate the Act while remaining consistent with its approach to these agreements as defining individual business relationships.

This approach, under which consistency with federal law is assured not by conferring federal court jurisdiction (which the Act does not in interpretation cases), but by relying on

state courts to follow federal substantive law, is both consistent with the Act and not unlike another federal statute that imposes federal duties on private parties to contracts without conferring federal jurisdiction, *i.e.*, the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq. See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n. 32 (1983) (FAA creates federal substantive law establishing and regulating duty to arbitrate, but leaves primary enforcement of that duty to state courts construing contracts). The operation of federal arbitration laws demonstrates that federal jurisdiction is not viewed by Congress as necessary to obtain consistency with federal law or policy in the regulation of competing and contracting businesses. It is no more necessary under the "new paradigm" for utilities regulation embodied by the 1996 Act.

II. ILLINOIS WAS NOT "INVITED" TO PARTICIPATE IN LOCAL TELEPHONE REGULATION AND DID NOT "OPT" TO WAIVE ITS ELEVENTH AMENDMENT IMMUNITY KNOWINGLY OR VOLUNTARILY.

Respondents have failed to demonstrate that the State of Illinois constructively waived its Eleventh Amendment immunity, either knowingly or voluntarily. Their description of a scheme in which state commissions gratefully accept Congress' largesse and voluntarily enlist as "deputized federal regulators" (Ameritech Br. at 38) to enforce interconnection agreements, knowing full well that they subject themselves to federal lawsuits, simply does not reflect the contents of the 1996 Act. That statute, and particularly its local telephone provisions, speaks in mandatory terms regarding the functions of state commissions. Constructive waivers, by contrast, must be explicitly requested and made, and voluntarily made at that. Without statutory language or legislative history to support it, Respondents ask the Court to deem Congress to have done something it did not do.

Like the Seventh Circuit, Respondents again make little effort to advance a text-based argument for constructive waiver. They assert instead that the 1996 Act simply "must be understood" (US Br. at 14) to have provided that state commissions would be defendants in federal suits and that such suits are the "implication" of the statute (AT&T Br. at 41), though not said "in so many words" (US Br. at 34). As a State, however, Illinois was entitled to exactly "so many words" as were necessary to make "unmistakably clear in the language of the statute," *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985), that it was being asked to give up its constitutional protection. Arguments that implied invitations to waiver based on statutory structure satisfy the "clear statement" rule were rejected in *Dellmuth v. Muth*, 491 U.S. 223 (1989), and in that case even Justice Scalia, providing the fifth vote for reversal, construed the rule to require, if not express reference to suit against States, at least "statutory text that clearly subjects States to suit," *id.* at 233 (Scalia, J., concurring). As Petitioners noted in their initial Brief at 31, § 252 at most confers jurisdiction on district courts to review certain decisions of State commissions, but identifies no parties other than the "aggrieved" plaintiff. Respondents' analogy to the FCC hardly proves their point; the ICC, a state agency, is entitled to the protection of the "clear statement" rule, whereas the FCC, a creature of Congress, is not.

Respondents' constructive waiver arguments depend on repeated assertions that Congress had the authority to exclude state commissions from the regulation of local telecommunications and then invite them to return if they consented to have their decisions reviewed in federal courts. The proposition that Congress actually did either of these things finds no support in the 1996 Act itself. As Petitioners observed in their initial Brief at 36-37, the Act permits preemption only where it is made explicit, such as when a

state commission "fails to act" under § 252(e)(5).[6] Recognizing the absence of such explicit language, two Respondents suggest that it was enough that Congress "could have" preempted the States from local telephone regulation (Ameritech Br. 37, AT&T Br. at 43). If accepted, this proposition would allow Congress to subject States to federal suit wherever it possessed preemptive authority, whether it had actually exercised that authority or not.

Respondents attempt to satisfy the requirement of *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) that waivers be voluntary by arguing that, given Congress' preemptive power over local telephone regulation (whether actually exercised or not), the ICC's adjudication of the complaints brought by the private Respondents should be deemed the acceptance of a Congressional invitation to participate in such regulation. Despite the words actually used in § 252, Respondents insist that state commissions received in that section an "offer" (Ameritech Br. at 32, AT&T Br. at 40) or an "invitation" (WorldCom Br. at 47) or were "invited" (U.S. Br. at 31, AT&T Br. at 1) to participate in local telephone regulation under the 1996 Act, that they were "free to decline" (U.S. Br. at 13) these invitations, but that the ICC voluntarily "opt[ed]" (AT&T Br. at 9) in, consenting thereby to subject itself to federal suit.

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[6] Respondents similarly point to no language preempting Illinois law that requires the ICC to adjudicate complaints, see Petitioners' Br. at 37. That Virginia has declined to do so demonstrates no more than that its commission believes Virginia law allows it to. Further, contrary to the contention of Ameritech, Br. at 39 n. 13, the Illinois statutes that require the ICC to adjudicate complaints, 220 ILCS 5/10-108, 10-109 and 10-110, were enacted well before the 1996 Act and thus could not express any view on Illinois' part regarding the Act's federal review provisions.

The statute itself does not contain these words or anything remotely like them. As set forth in Petitioners' initial Brief at 36-37, § 252 directs state commissions to arbitrate and approve agreements in mandatory terms, prescribing what a state commission "shall" do and declaring that a state commission that does not do so "fails to act to carry out its responsibility," § 252(e)(5). By using the "mandatory 'shall,'" § 252 excluded the possibility that participation in regulation under the 1996 Act was something state commissions were "invited" to do. *Lopez v. Davis*, 531 U.S. 230, 241 (2001); *id.* at 248 (Stevens, J., dissenting) ("the words 'may be reduced' do not mean 'shall be reduced'"); *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("If we do our job of reading the statute whole, we have to give effect to this plain command ["shall"]... even if doing that will reverse the longstanding practice under the statute and the rule.") (citations omitted); *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947).[7] That language cannot can be read as "inviting" state commissions to act or to regard their doing so as the voluntary exercise of a right to consent to federal suit. The Act's language cannot be read to request a voluntary waiver of Eleventh Amendment immunity.

In addressing Petitioners' arguments that constructive waivers of Eleventh Amendment immunity did not survive *College Sav. Bank* (Pet. Br. at 33-34) and that the power exercised by Congress in enacting the 1996 Act was not that of offering a "gratuity" (*id.* at 35-36), Respondents rely principally on their preemption claims. They do not otherwise address the Court's distinction, 527 U.S. at 686-87, between the power to bestow things of value like money, *e.g., South Dakota v. Dole*, 483 U.S. 203 (1987), or the approval of a compact, *e.g., Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), and regulatory or even "preemptive" power. The latter is inherently coercive, as the Court recognized in *College Sav. Bank* in distinguishing between powers exercised to grant benefits to States and those used to exclude them from "otherwise lawful activity." 527 U.S. at 687. There is no less danger of coercion when the same unilateral exercise of power is relied on to make the activity "unlawful" in the first place.

To the extent they are relevant to this case at all, *Petty* and *Dole* merely underscore the importance of the "clear statement" rule in assuring knowing and voluntary waivers, even where the power exercised is donative rather than regulatory. They show how, like waivers of constitutional rights generally, waivers of sovereign immunity, by conduct or otherwise, require that the scope of the waiver sought must be made clear before a knowing and voluntary waiver can occur. In *Petty*, the interstate agreement that Congress approved under the Compact Clause, U.S. Const., art. 1, § 10, explicitly addressed the suability of the commission the agreement created. In response, Congress, in approving the compact, specifically provided that the compact's language would not diminish the jurisdiction of any federal court. 359 U.S. at 277-78. Accordingly, the States and Congress spoke to one another about whether and how the States' commission could be sued before the States accepted and acted upon the compact. *See id.* at 280 ("[Congress] approved a sue-and-be-sued clause in a compact under conditions that make it clear that the States accepting it waived any immunity from suit which they otherwise might have."); *see also Dole*, 483

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[7] In *Yungkau*, the statute at issue used both "shall" and "may," reinforcing the Court's reading of "shall" as mandatory. 329 U.S. at 485. "May" appears several times in § 252, *see, e.g.*, § 252(b)(4)(B) (state commission may require parties to provide information needed for arbitration); § 252(g) (state commission may consolidate proceedings); § 252 (h) (state commission may charge reasonable fee for approval and filing of agreements), suggesting that, where "shall" was used instead, it was meant to have its mandatory meaning.

U.S. at 209 ("The conditions upon which States receive the funds, moreover, could not be more clearly stated by Congress."). This sort of dialogue between the State of Illinois and Congress is entirely absent in this case. Congress' action in passing the 1996 Act was unilateral, and, as discussed above and in Petitioners' initial Brief, the Act did not address the suability of State agencies or officials at all, especially not in the context of review of interpretation decisions. Thus, unlike *Petty* and *Dole*, there is no antecedent pronouncement or exchange in this case upon which to base a conclusion that the ICC's actions represented a knowing and voluntary waiver.

Respondents also lean heavily on certain statements in *AT&T v. Iowa Util. Bd.*, 525 U.S. 366, 378 n.6 (1999), in advancing the preemption arguments on which their constructive waiver claims rely. The issue in that case was, of course, the extent of FCC rulemaking power in the area of local telecommunications, not whether certain state commission proceedings come within § 252 or whether state commissions are constitutionally immune from federal suits. In placing such weight on a footnote in a case addressing different issues, Respondents have ignored the Court's warning against assigning undue precedential value to statements it has made about jurisdiction in cases where that jurisdiction is not at issue. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91 (1998).

In any event, footnote 6 in *Iowa Util. Bd.* must be read in conjunction with qualifying statements made by the Court in that case. For example, the Court observed that, while the Act "has removed a significant area from the States' *exclusive* control," where it had "remained silent," § 152(b), which had assigned responsibility for local telephone regulation to States, "continue[d] to function," 525 U.S. at 381 n. 8 (emphasis added). The Court also noted that the Act had "entrusted" the approval of interconnection agreements to

state commissions under § 252(e) but added that the FCC could issue rules "to guide the state-commission judgments" in that area. *Id.* at 385. Finally, in responding to arguments made in dissent in defense of general state commission authority free of FCC rulemaking in areas including the approval of interconnection agreements, the Court passed as close as it came to the issues in this case, noting that, "constitutional impediments aside," a federal regulatory scheme that left policymaking to state agencies that were "beyond federal control" was a "decidedly novel" design. *Id.* at 385 n. 10. Taken together, these statements demonstrate that footnote 6 does not resolve the issues in this case, especially not whether "constitutional impediments" like the Eleventh Amendment interfere with the operation of § 252(e)(6).

Finally, Ameritech wrongly denigrates state interests when it relies on a federal interest it terms "unique." Ameritech Br. at 38. The state interests at stake here are far more important than those involved in the college savings plan in *College Sav. Bank* and the railroad in *Parden v. Terminal Ry.*, 377 U.S. 184 (1964); they include not only Illinois' constitutionally-protected right to be free of federal suit under the Eleventh Amendment, but also its core interest in continuing to regulate local telecommunications through the ICC and its courts, as it has done for decades. Nothing in *College Sav. Bank* suggests that the bar for waivers of Eleventh Amendment immunity is lowered because of the relative strengths of federal and state interests; indeed, the rejection in *College Sav. Bank* of the "market participant" exception to the constructive waiver rule, 527 U.S. at 679-80, suggests the contrary. Ameritech's argument, if accepted, would lead to the irony pointed out so well by the States of New Jersey, *et al.*, in their brief as *amici curiae* in this case, namely that Illinois would be safer from federal suit running a telephone company than regulating one. Brief of State of New Jersey, *et al.*, at 19.

III. THE ELEVENTH AMENDMENT AND THE 1996 ACT ITSELF BAR A SUIT UNDER *EX PARTE YOUNG* BASED ON AN ALLEGATION THAT OFFICIALS MISAPPLIED FEDERAL LAW WHEN THOSE OFFICIALS ARE PART OF A REGULATORY APPARATUS DESIGNED TO CORRECT SUCH ERRORS.

Respondents misapprehend both the nature of the Court's holding in and the nature of Petitioners' reliance on *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). Respondents argue that *Larson*, which concerned the sovereign immunity of the United States, does not apply to a case in which state officials are sued. But *Larson* did not concern the *source* of the authority for the actions challenged in that case. Instead, the Court focused on the *character* of the activity in relation to the scope of that authority, without regard to its source, in holding that a suit seeking to enjoin that activity was directed against the sovereign itself and therefore barred by immunity. *Id.* at 690-91. Accordingly *Larson*, *id.* at 687 n. 6, relied on *Minnesota v. Hitchcock*, 185 U.S. 373 (1902), which discussed the Eleventh Amendment's protection of States from federal suit in considering the Court's jurisdiction over controversies in which the United States was a party and concluded that the same rule that applied to States, *i.e.*, that whether a suit is in fact against the State is to be determined by the result of the decree and not merely who is named as a defendant, should apply as well to cases where federal officials are sued. 185 U.S. at 386-87.

The Court has since relied on *Larson* in considering Eleventh Amendment immunity, most notably in *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 112-15 (1984). *Pennhurst* cannot be distinguished from this case because a state law violation was alleged. The *Pennhurst* Court relied on *Larson* for what it said about the nature of the official action at issue, namely that "an error of law by state officers acting in their official capacities will not suffice to override the sovereign immunity of the State where the relief is effectively against it." 465 U.S. at 113. The Court did not find *Larson* inapplicable because it involved a different sovereign or source of authority. *Pennhurst*, *Larson* and *Hitchcock* demonstrate that the principle that an official who has made an alleged error in the application of laws he is charged with applying has not "violated" that law, and that suits challenging such conduct are directed at the sovereign, whether federal or state.[8]

Contrary to Respondents' contention, moreover, suits against members of the ICC are not necessary to vindicate the Supremacy Clause, U.S. Const., art. VI, cl. 2. Respondents portray the ICC in isolation rather than as a part of a complete state regulatory apparatus that includes a right of appeal to courts that will assure consistency with federal law. Illinois' courts of review are not merely available to provide a "prompt and effective remedy," *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 293 (1997) (O'Connor, J., concurring) (internal quotations omitted); they hear appeals from ICC decisions under the Illinois Public Utilities Act, the same state statute that authorizes the ICC to act in the first place. *See* 220 ILCS 5/10-201 and 202. It was for this reason that the Court in *Alabama Pub. Serv. Comm'n v. Southern Ry. Co.*, 341 U.S. 341 (1951), barred a suit in federal court to enjoin members of a state utilities commission from enforcing an order of that commission. While the Court did note that *Ex parte Young*, 209 U.S. 123 (1908),

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[8] Nothing said in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) contradicts that principle. In fact, the dissenting opinion therein relied on Larson in that Eleventh Amendment case, though only for the proposition that a suit under *Ex parte Young*, 209 U.S. 123 (1908), is permitted when a state official's act does "violate" federal law, 521 U.S. at 300 (Souter, J. dissenting).

permitted such suits, *Alabama Pub. Serv. Comm'n*, 341 U.S. at 344 n. 4, it barred the suit because Alabama, like Illinois, provided that an appeal was available as a matter of right as "an integral part of the regulatory process under the Alabama Code." 341 U.S. at 348.[9] Thus, contrary to WorldCom's contention (WorldCom Br. at 36), the absence of responsibility to the "federal executive" does not require that ICC members be suable in federal courts. Indeed, under the federal regulatory system the executive is not relied on to control the FCC's decisions in individual cases; that task is similarly assigned to the federal appellate courts under 28 U.S.C. § 2342.

Contrary to Ameritech's contention (Ameritech Br. at 40), the *Alabama* case limited earlier cases in which the Court upheld federal injunctive suits against state commission orders. The Court imposed that limitation in the *Alabama* case to vindicate interests of comity among States and federal courts. 341 U.S. at 349-50. Those same interests support a limitation on the use of federal courts' equitable powers under *Young* against state utilities commissioners where a state regulatory scheme, of which a utilities commission and reviewing courts are a part, can and will correct their errors of law, state or federal, without compromising their status as officials of a sovereign State.

Respondents also attempt to distinguish *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), on the grounds that the statutory scheme at issue there was more "intricate" than that provided by §252(e)(6). The holding in *Seminole Tribe*, however, did not depend on intricacy. Instead, the Court declined to extend the judicially created *Young* doctrine to a

[9] *See also* 341 U.S. at 356 (Frankfurter, J., concurring) ("What the Court today holds is that if a plaintiff can be sent to a State court to challenge an agency order there is no federal court available to him.") (footnote omitted).

case "[w]here Congress has created a remedial scheme for the enforcement of a particular federal right." 517 U.S. at 75. The critical point was Congress' intent as expressed by its specification of a remedy, and not how complicated the remedy was. *See id.* at 75-76 ("[t]he fact that Congress chose to impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young* strongly indicates that Congress had no wish to create the latter....").

Even under Respondents' broad reading of §252(e)(6), the remedy it provides is significantly more "limited" than those available in a suit in equity that would expose Petitioners to "the full remedial powers of a federal court," *Seminole Tribe*, 517 U.S. at 75. Section 252(e)(6) is limited in its title to "[r]eview of State commission actions," and permits the bringing of an action only "to determine whether the agreement... meets the requirements of [§§ 251 and 252]." At most that provision embodies the familiar concept of judicial review of an administrative agency's rulings, a remedy that does not involve suing officials of those agencies.[10] This limitation is made clearer by the 1996 Act's definition of "state commissions," upon which Respondents Ameritech and WorldCom rely in arguing that the Act provides that state commissioners can be sued. Ameritech Br. at 48; WorldCom Br. at 42. At 47 U.S.C. § 153(41), the Act defines "State commission" to include "the commission, board, or official (by whatever name designated) *which under the*

[10] Notably, Respondents' analogy to federal appellate review of FCC rulings, so prominent in their arguments about the scope of § 252 and the ICC's purported waiver of Eleventh Amendment immunity, is absent from their arguments about *Ex parte Young*. Respondents cannot argue that the ICC should expect to be treated like the FCC and yet claim that its individual commissioners should be subject to general equitable remedies not available under the Act against their federal counterparts.

laws of any State has regulatory jurisdiction with respect to intrastate operation of carriers" (emphasis added). Under Illinois law, upon which the Act's definition depends, no individual ICC commissioner has any jurisdiction. Instead, all actions approved by a majority of commissioners are "deemed to be the finding, order or decision of the Commission." 220 ILCS 5/2-101. Accordingly, even if § 252(e)(6) provided for suit against "State commissions" (which it does not), Petitioners as individual commissioners would not fall within that term. Similarly, the contention of Respondent AT&T (AT&T Br. at 48-49) that injunctions are generally available in federal agency cases is also contradicted by 47 U.S.C. § 401(a), which permits federal courts to grant injunctive relief for violations of the 1996 Act only upon application of the Attorney General. *Conboy v. AT&T Corp.*, 241 F.3d 242, 254-55 (2nd Cir. 2001). Subjecting Petitioners to injunctive suits as individuals would therefore contravene Congressional intent as expressed in the Act and elsewhere in federal telecommunications law.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

JAMES E. RYAN
Attorney General of Illinois

MYRA L. KAREGIANES
General Counsel

JOEL D. BERTOCCHI
Solicitor General
Counsel of Record

JOHN P. KELLIHER
THOMAS R. STANTON
Special Assistant Attorneys General
Illinois Commerce Commission
160 North LaSalle Street
Chicago, Illinois 60601
(312) 793-2877

A. BENJAMIN GOLDAR
MICHAEL B. DOYLE
RICHARD S. HUSZAGH
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3698